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No. 84-2008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC.,
Petitioners

v.

JOSEPHINE SCHWEITZER, ET AL.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF AMATEX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION OF READING COMPANY AND CENTRAL JERSEY INDUSTRIES, INC. FOR A WRIT OF CERTIORARI

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MOTION OF AMATEX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amatex Corporation ("Amatex") hereby respectfully moves for leave to file the attached Brief *Amicus Curiae* in support of the Petition for Writ of *Certiorari* filed by the Reading Company in this case. The consent of the respondents was requested but refused. The interest of Amatex in this case arises from the fact that it is a debtor in a bankruptcy proceeding presently pending in the United States Bankruptcy Court for the Eastern District of Pennsylvania in which the same issue is before the Court, namely whether persons who have suffered latent asbestos injuries prior to bankruptcy have "claims"

which must be provided for in a plan of reorganization or liquidation and, correspondingly, whether such claims are dischargeable in bankruptcy.

The interest of Amatex Corporation further arises from the fact that the Court of Appeals for the Third Circuit has ruled in its case that latent asbestos injury plaintiffs are entitled to be represented by a guardian *ad litem* in all phases of the bankruptcy proceeding. *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985).

The decision of the Third Circuit in this case, by a different panel, that latent asbestos injury plaintiffs do not have "claims" cognizable in bankruptcy, undermines the purpose for which a guardian *ad litem* has been appointed in the *Amatex* case.

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STATEMENT OF AMATEX'S INTEREST IN THE CASE

Amatex Corporation ("Amatex") has an interest in this case because the holding of the court below threatens its very survival and the future of all of its employees. The holding of the court below, if allowed to stand, may render impossible the reorganization of Amatex, Johns-Manville or any company which is a mass toxic tort defendant.

Amatex is a small manufacturer of fire retardant asbestos cloth used primarily in protective clothing. Since November 1, 1982, when it was forced to file for protection under Chapter 11 of the Bankruptcy Code, Amatex has been struggling to reorganize in the face of some 10,000 lawsuits which have been commenced against it as a co-defendant with Manville and other asbestos manufacturers. Amatex expects that another 20,000 lawsuits may be filed against it in the future by persons alleging that their contact with its products in past years has resulted in disease (hereinafter referred to as "latent asbestos injury plaintiffs," "future claims" or "future tort liability").[1] It is clear that neither Amatex nor any other asbestos manufacturer can survive if its future tort liability cannot be managed in a bankruptcy proceeding.[2]

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1. *See* A. Walker, *Projections of Asbestos-Related Disease, 1980-2009*, a final report prepared for the Johns-Manville Corporation and discussed in Congress: reprinted in *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims: Hearing Before the Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives*, 97th Cong., 2d Sess. 23-51, held September 9, 1982.

2. Proofs of Claim filed against Amatex in the Bankruptcy Court indicate total claims to be $6,740,294,500. Amatex's assets, valued at going concern values, amount to approximately $5,200,000 and its remaining insurance coverage amounts to approximately $9,000,000. All of the reorganization plans proposed in the Johns-Manville bankruptcy proceeding are conditioned on the ability of the company to secure an order freeing the surviving or successor company from all liability to future asbestos claimants. In re *Johns-Manville Corporation*, Case Nos. 83B 11656-11676, plan of reorga-

Amatex has always recognized that it cannot secure a discharge for its future tort liability through bankruptcy unless its plan of reorganization sets aside a portion of its assets or equivalent values for the future plaintiffs.[3] Furthermore, Amatex has consistently argued that the analogy between a bankruptcy proceeding and a proceeding involving beneficial interests in a trust or estate is so compelling that these unknown claimants must be represented by a guardian *ad litem* as a matter of due process. A determination that future plaintiffs do not have "claims" cognizable in bankruptcy means that their claims will survive the bankruptcy, but it also means that they cannot be provided for in a plan of reorganization or in liquidation. The conclusion that their claims will not be discharged in bankruptcy may be

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NOTES (*Continued*)

nization proposed by Manville Corporation dated October 17, 1983, Article VI, pages 38 to 39; *see* proposal made by Leon Silverman, Esquire, Legal Representative for future claimants appointed by the Bankruptcy Court pursuant to its opinion rendered in *In re Johns-Manville Corporation*, 36 Bankr. 743 (Bankr. S.D.N.Y. 1984): *Proposal of Legal Representative for Future Asbestos Health Claimants for Principal Elements of a Plan of Reorganization*, 1985 Stockholders & Creditors News Serv. 3711 (Andrews May 8, 1985).

3. On March 1, 1983 (within the 120 day exclusivity period allowed by the Bankruptcy Code), Amatex filed a Plan of Reorganization. The plan proposed that Amatex would (1) create an irrevocable trust for the benefit of both existing and future asbestos claimants, and (2) pay to the trustee of the trust certain fixed cash payments, in annually escalating amounts for the next twenty years, whose present value was intended to equal or better the liquidation value of Amatex's assets. In addition, Amatex proposed to transfer to the trustee all of its rights in the remaining insurance coverage and to cooperate with the trustee in an attempt to persuade its insurance carriers to contribute to the trust the remaining balances in its coverage plus additional amounts representing the saving in defense cost which would result if Amatex's plan were confirmed and all latent asbestos claims were transfered to the trust fund.

small solace to these plaintiffs if, as a result of the continuing mass tort liability, the company cannot reorganize, is liquidated and the assets are distributed to the existing plaintiffs and trade creditors leaving future plaintiffs with a right of action against an empty shell.

On February 22, 1985, Amatex won a major victory in its battle to survive when the United States Court of Appeals for the Third Circuit ruled that latent asbestos injury plaintiffs are entitled to be represented by a guardian *ad litem* in all phases of the bankruptcy proceeding. *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985). Although the Third Circuit declined in the *Amatex* case to rule on the question whether latent asbestos injury plaintiffs have "claims" cognizable in bankruptcy, it recognized that future plaintiffs will be vitally affected by the resolution of that question in the bankruptcy proceeding.

It is clear from the opinion of the court in the *Amatex* case that it thought that the guardian *ad litem* must be given an opportunity to address the fundamental issue whether the persons he represents have "claims":

> Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests more effectively . . . . Much more information must be gathered before it can be determined how to provide most equitably for all concerned . . . . The bankruptcy court, with its factfinding capabilities, appears to be the proper forum to gather the relevant evidence and resolve these difficult issues in the first instance.

755 F.2d at 1043-44.

On March 29, 1985, a different panel of the same circuit court announced its opinion in this case. Although this case arose under the railroad reorganization provisions of the Bankruptcy Act, the court construed similar language defining "claims" under the Act, as not

including claims of persons who have suffered latent asbestos injuries prior to bankruptcy but who have not yet had any manifestation of a disease. The decision of the court in this case undermines the role of the guardian *ad litem* in *Amatex* and affects Amatex's ability to reorganize.

SUMMARY OF ARGUMENT

Amatex urges the Court to grant review of this case for the following reasons:

1. The view of the court below that latent injuries cannot be recognized as "claims" in a bankruptcy proceeding if generally adopted and applied under the Bankruptcy Code will seriously hinder successful reorganization for companies faced with mass tort liability and may force a significant segment of American industry to be liquidated.

2. No useful policy is served by such a holding, particularly since Congressional intent and the policy of the Bankruptcy Acts favor reorganization over liquidation. In addition, although the future rights of action of latent injury plaintiffs will be preserved *de jure* against discharge, *de facto* most of them will be destroyed because the defendant companies will be liquidated. Moreover, if liquidation is inevitable, present plaintiffs are not served by such a holding because so long as future claims remain outstanding the assets of the debtor cannot be sold as a going concern for fear of successor liability. Such assets will have to be sold, if at all, piecemeal at distress values.

3. This case was not a case in which a decision so adverse to future claims should have been rendered. The Reading Company was not threatened by mass toxic tort liability. It was not threatened by inevitable liquidation because of such liability. There was evidence in the record that officials of the old Reading Company were aware that some of its employees might have claims against the

company for exposure to asbestos. *Schweitzer v. Consolidated Rail Corp.* 36 Bankr. 469, 472 (E.D. Pa. 1984). The Reading, however, did not seek representation for such claims nor attempt to give them notice nor did it provide for them in its plan of reorganization. Thus, regardless of whether persons who have latent asbestos injuries have claims cognizable in a bankruptcy proceeding, the claims of the Reading plaintiffs could not have been discharged because of a fundamental lack of due process. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

4. Cases such as *Amatex* and *Manville* present a different situation since the expected future plaintiffs are not former employees and cannot, therefore, be readily identified or given personal notice. The lower courts seem mistakenly to believe that difficulties of notice compel the exclusion of such future plaintiffs from participation in the bankruptcy estate as claimants. This Court should make clear that due process cannot be given the ironic twist of excluding persons from sharing in a bankruptcy estate when there is a serious risk that nothing will be left for them in the future.

5. The *Amatex* case in which a guardian *ad litem* has been appointed for latent asbestos injury plaintiffs and in which the debtor is seeking to provide for these claims in its plan of reorganization furnishes a more appropriate context in which the issue of future claims should be explored and resolved. This case, which involved that issue only tangentially, which did not present the hard realities of a choice between some provision being made for future claims and no provision at all, and in which the real parties in interest, namely the thousands of latent asbestos tort victims, were not represented, is not the forum in which these issues crucial to American industry should have been decided.

6. Although the decision of the Third Circuit in the instant case construes the provisions of the old Bankruptcy Act, it is unlikely, as a practical matter, that the

Third Circuit will take a different view of the meaning of "claims" under the Bankruptcy Code. Because of its limited financial resources Amatex may not be in a position to secure redress in its own case particularly if it is then pressed by a plan of liquidation or is unable to withstand a motion to convert to chapter 7.

ARGUMENT

1. The Statutory Interpretation Of The Bankruptcy Act By The Lower Court Is Contrary To Congressional Intent And May Result In The Liquidation Of Amatex And Other Companies Causing Serious Repercussions Throughout The American Economy.

A decision that persons who have come in contact with a toxic product of the debtor prior to bankruptcy but who have no manifestation of a disease until afterwards are not "claimants", has the following undesirable consequences:

First, the debtor cannot make any provision for such future claims in the plan of reorganization. This is a point which has eluded the court below. The court below has intimated that even if the future claimants have no "claims", a portion of the assets of the debtor may still be set aside for them.[4] This is simply wrong as a matter of law.

Second, the debtor will not be discharged from liability to such future claimants. In the case of most of the mass tort defendants, including Manville, if the debtor cannot be discharged and its assets cannot be freed from liability in the hands of a successor, it will mean that the business of the debtor cannot be saved and will have to be liquidated.

Third, future claimants will not be entitled to share in any of the proceeds of liquidation.

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4. *Schweitzer v. Consolidated Rail Corporation* 758 F2d 936, 944 n.l (3d Cir. 1985).

Fourth, the fact that future claims are not discharged will mean that the assets of the company will have to be sold piecemeal at distress value since no one will be able to afford to purchase the assets as a going concern for fear of successor liability. Ironically, therefore, the present plaintiffs may not be served by an attempt to exclude future plaintiffs from a share of the debtor's estate.

The new Bankruptcy Code expressly refers to "contingent" and "unmatured" claims in its definition of "claim", Bankruptcy Code §101(4)(A), 11 U.S.C. §101(4)(A) (1982). Although the definition of "claim" in the Bankruptcy Act construed by the lower court in the instant case was not as explicit, the court below recognized that the words "or other interests of whatever character" have been read by judicial construction to include contingent and unmatured claims. It nevertheless held that such claims do not include any subclinical injuries which have not yet matured into a cause of action.

In holding that the moment when a "claim" arises in bankruptcy is the same as the moment when a cause of action "accrues", the court below misunderstood the policies that are involved. The bankruptcy acts are concerned with identifying the persons who should share in the bankruptcy estate and who should have a voice in its disposition. All of the cases which have hitherto addressed the question when a cause of action "accrues" are concerned with identifying the point at which the statute of limitations begins to run. Of course state statutes of limitations are generally interpreted to preserve latent injury claims to avoid unjustly depriving claimants of their claims. As this court observed in *Urie v. Thompson*, 337 U.S. 163 (1949), it is manifestly unfair to allow the statute to run unless a plaintiff is sufficiently aware of his injury to commence an action.

However, this same policy, applied in the bankruptcy context, supports the conclusion that the existence of a "claim" should be based upon the existence of

the injury, rather than its later manifestation. This is so because if these potential plaintiffs are held to have post-petition claims based upon the date of manifestation, they will receive nothing. The very existence of post-petition claimants will prevent reorganization, forcing the debtor company to be liquidated. The debtor will become an empty shell. There will be no surviving company against whose assets the post-petition claimants will be able to recover. Therefore, the same policy of avoiding the unjust destruction of a claimant's rights, supports a holding in the bankruptcy context that such latent injury plaintiffs have "claims."

Furthermore, it is not true to say that state law will not recognize the existence of a claim prior to the manifestation of an injury. In a recent case, *Moore v. Jackson Park Hospital*, 95 Ill. 2d 223, 447 N.E.2d 408 (1983), the Illinois Supreme Court had to consider the effect of a statute which purported to bar all rights of action arising out of a medical procedure brought more than four years after the date of the procedure. The court refused to allow retroactive application of the statute to a plaintiff who was injured in an operation prior to the effective date of the statute but whose injury did not become manifest until after the statute went into effect. It rejected the argument that the plaintiff had nothing which required any protection prior to the date when the injury became manifest:

> We do not agree that a cause of action is nonexistent prior to the time of accrual. Logic dictates that a plaintiff cannot bring a cause of action until he knows or reasonably should know of his injury, and also knows or reasonably should know that the injury was caused by the wrongful acts of another. However, that does not mean that the plaintiff does not have an existing cause of action of which he is unaware.

447 N.E.2d at 412.

In any event, the purposes for which "claims" need to be identified in a bankruptcy proceeding are wholly different from the purposes informing the choice of a time for the running of a statute of limitations.

A bankruptcy proceeding is in essence an equitable proceeding to administer the estate of the debtor and to allocate its value among all persons who have "claims" against the debtor that arose prior to the bankruptcy filing. *Pepper v. Litton*, 308 U.S. 295, 304 (1939). It is a proceeding *in rem*, *Hanover National Bank v. Moyses*, 186 U.S. 181, 192 (1902); *Katchen v. Landy*, 382 U.S. 323 (1966).

"Claims" are defined in the same way whether the proceeding results in a successful reorganization or whether the debtor is liquidated. The essential scheme of the bankruptcy statutes is to let the claimants decide whether they are better off allowing the debtor to survive than they would be if the debtor were liquidated. The Bankruptcy Court is given the power to force a plan on the claimants but only if it is satisfied that the plan is "fair and equitable" to them all. One of the tests applied by the courts in this regard is whether under the plan each claimant receives money or property of a value at least equal to the value he or she would have received if the debtor were liquidated. This test is codified in Section 1129(a)(7) of the Bankruptcy Code, 11 U.S.C. §1129(a)(7) (1982).

Thus the decision to deny them status as "claimants" means that latent asbestos injury plaintiffs will have no voice in the decision whether a company should live or die and no right to share in the bankruptcy estate, either through a plan of reorganization or in liquidation.

2. The Lower Court Adopted a Narrow Interpretation of the Statute In The Mistaken Belief that it Was Constitutionally Required

In adopting an unduly narrow construction of "claim" under the bankruptcy statute the court below was motivated by a mistaken view of the requirements of due process set forth in this Court's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Since the instant case involved the claims of former employees, the court below correctly concluded that the Reading Company had the means at hand and therefore the obligation to attempt to identify the persons who might have been injured and to give them notice before their claims could be discharged. Somehow, however, its concern that the notice required under *Mullane* may have been difficult or impossible to give, led the court to the conclusion that these persons have no "claims" within the meaning of the bankruptcy statute. This conclusion is simply wrong. As will appear below, *Mullane* does not require that personal notice be given to every person whose claim may be affected by a decree but only requires that a reasonable effort be made to reach all persons so affected by the best means available under the circumstances.

It is clear that the Reading did not meet these requirements. It did not search its records to ascertain the names of its former employees and their addresses and make reasonable efforts to contact them personally, nor, to the extent that such persons could not have been easily identified, did it attempt to reach them by publication or seek the appointment of a guardian *ad litem* for them.

The simple answer in this case, therefore, was that the claims of these employees could not have been discharged by the bankruptcy decree. Failure of constitutionally mandated notice is no argument for limiting the

persons who can be recognized as claimants in a bankruptcy proceeding.

The only way in which the decision below can be explained would be to say that the court meant to hold that persons whose injuries have not become manifest are so unlikely to respond to any form of notice that the constitutional requirements of notice cannot be met as to them under any circumstances. This is tantamount to saying that courts are powerless to adjudicate the rights of persons who are not likely to respond to even the best designed notice. That conclusion is manifestly incorrect.

Unborn beneficiaries of a trust or an estate are not capable of responding to notice, yet chancellors have for centuries adjudicated the rights of such beneficiaries when it was necessary to do so to declare the rights of living beneficiaries. The problem of notice has been solved, as far back as the Year Books of Edward II, by appointing a guardian *ad litem* for such persons.[5] When a guardian *ad litem* has been appointed for unborn beneficiaries of a trust it has never been seriously suggested that their rights cannot be affected because they are personally incapable of responding to notice. What is not permissible is for a court to proceed to adjudicate the rights of such beneficiaries without appointing a guardian *ad litem* for them. *McArthur v. Scott*, 113 U.S. 340 (1885). A bankruptcy proceeding is, in effect, a proceeding to administer an estate or a trust. The creditors or claimants are the beneficiaries.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) supports the conclusion that the rights of beneficiaries who may not be capable of responding to notice can be adjudicated if a guardian *ad litem* is appointed for them. Although that case is usually noted for its holding that personal notice by mail must be given to

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5. Year Book III, 4 Ed. II, at 191 (Selden Society); W. Holdsworth, *History of English Law* 317 (4th Ed. 1936); *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966).

all beneficiaries whose addresses are known or can be reasonably discovered by due diligence, *Mullane* also dealt with the requirements of notice when the beneficiaries are unknown. Some of the beneficial interests in the trusts and estates that constituted the common trust fund in *Mullane* were held by persons who were yet unborn. *See In re Central Hanover Bank & Trust Co.*, 75 N.Y. S.2d 397, 399 (Surr. Ct. N.Y. County, 1947). A guardian *ad litem* was appointed to represent all absent beneficiaries. 339 U.S. at 306. Mullane, the appellant, was the guardian *ad litem*. This Court approved notice by publication as to those beneficiaries whose whereabouts were unknown (including, presumably, the beneficiaries not yet *in esse*) in the following words:

> "This Court has not hesitated to approve or resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. . . . .
>
> "Those beneficiaries *represented by appellant* whose interest or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

339 U.S. at 317 (emphasis added).

Persons who are not likely to respond to any form of notice, of course, should not be foreclosed by any present judicial proceeding if their rights can just as well await future identification and adjudication. There are cases, however, where the judiciary does not have the luxury to wait until unidentified claimants assert themselves. Such is the case when claims to a limited fund are

involved.[6] To award the fund entirely to persons who have identified themselves, when it is known that there are other persons not presently identifiable who have an interest in the fund, merely because notice cannot be given to such others is the essence of irony:

> [I]n cases in which contingent tort claims exceed firm value, a blind invocation of due process notice constraints will defeat the economic interest of those whom the notice requirements are invoked to protect . . . . Surely due process cannot deny the assertion in bankruptcy of a future claim in the face of a serious risk that little or nothing will be left to satisfy the claim when it is eventually reduced to judgment. Due process cannot be so ironically self-defeating.

Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 901 (1984).

Thus the difficulty of giving notice to all latent asbestos claimants cannot be a reason for excluding them from participation in the bankruptcy estate. The policy reasons which favor including them as claimants are compelling. The oft expressed concern that such recognition will allow manufacturers of defective products to cleanse themselves of future claims with impunity is simply misinformed. As the above discussion shows, a debtor cannot secure a discharge from future claims unless it is prepared to recognize their existence, secure the appointment of a guardian *ad litem* for them, and make provisions for them satisfactory to the guardian and to the court.

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6. Thus it has been recognized that in cases falling within Fed. R. Civ. P. 23(b)(1)(B), where claims are asserted against a limited fund, a class can be properly constituted even if all members of the class are not amenable to personal notice. The right of a member of the class to conduct his or her own lawsuit and the right to withdraw from the class may have little value if the fund is distributed to others and therefore notice is less important than is representation. 3B J. Moore, *Moore's Federal Practice* ¶¶23.35[2], 23.55 (2 ed. 1985).

In the instant case, there is no question that the then-future claimants received no notice, nor were they represented, at the time of the company's reorganization. Due process, therefore, requires that their claims remain viable against the reorganized company. The Third Circuit could thus have based its decision on valid constitutional due process grounds. Instead, in a mistaken belief that it was acting to preserve the interests of latent injury plaintiffs, it chose to interpret the statute in a way which prejudiced the very purpose for which a guardian *ad litem* was appointed in the *Amatex* case.

CONCLUSION

A question critical to the survival of a significant segment of American industry has been decided in this case. The court below held that claims of persons who have sustained latent injuries in the past which have not manifested themselves on the date of bankruptcy are not "claims" within the meaning of the railroad reorganization provisions of the Bankruptcy Act and cannot be discharged in a reorganization. If such claims cannot be provided for and managed in a bankruptcy proceeding, companies which have been forced into bankruptcy because of the assertion against them of a mass tort liability will not be able to reorganize and will have to be liquidated.

This case involved a company which had successfully reorganized because there was no general awareness at the time of its reorganization that there were any outstanding latent injury claims. The company, therefore, did not attempt to provide for these claims in its plan of reorganization, did not seek any representation for them and did not make any effort to give them notice. Furthermore, unlike Amatex and other asbestos manufacturers currently in Chapter 11, the company was not facing the prospect of liquidation because of its mass tort liabilities. It was, therefore, not a case which raised

squarely the question whether latent injury claims should be recognized as "claims" and thus be guaranteed a share of the debtor's estate or whether they should be denied that status and be forced to take the chance that the debtor will survive. This was not the case in which that fundamental question should have been decided.

Instead of facing the constitutional due process question, the lower court attempted to resolve the case before it by statutory construction. This attempt to skirt the constitutional problem resulted in a statutory interpretation which will hinder the administration of the bankruptcy laws. If allowed to stand and followed in other circuits, the Third Circuit's view that an individual with a latent injury cannot have a "claim" in a bankruptcy proceeding may preclude the successful reorganization of any company that is forced into bankruptcy by the assertion against it of mass tort liability. The result will be to deny any recovery to future plaintiffs against such companies without increasing the recovery to present plaintiffs, and to hasten the loss of industries and jobs which will ultimately have an impact on the public and the economy of the United States.

Respectfully submitted,

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